No. 95——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a railroad employee who goes between two railroad cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the Safety Appliance Act, 49 U.S.C. § 20302(a)(1)(A), even if there is no evidence that the drawbar was defective.

LIST OF PARTIES AND RULE 29.1 LIST

The only parties to this proceeding are the petitioner Norfolk & Western Railway Company and the respondent William J. Hiles.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Norfolk & Western Railway Company states that it is a subsidiary of the Norfolk Southern Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND LEGISLATIVE MATERIALS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk & Western Railway Company respectfully requests that a writ of certiorari issue to review the judgment and decision of the Appellate Court of Illinois, Fifth Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth District (App. at 1a-7a) is reported at 644 N.E.2d 508. The order of the Illinois Supreme Court (App. at 8a) denying petitioner's petition for leave to appeal is not reported. The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois (App. at 9a-10a) is not reported.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth Judicial District, was entered on December 29, 1994. App. at 9a-10a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on April 5, 1995. App. at 8a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

During the period relevant to this case, the federal Safety Appliance Act ("SAA") provided in pertinent part:

> [I]t shall be unlawful for any . . . common carrier [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2.[1]

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[1] Congress revised the provision effective July 5, 1994 and transferred it to 49 U.S.C. § 20302(a), which states in relevant part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . .

In amending the statute, Congress expressly provided that it was making "no substantive change in the law" and not "impair[ing] the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103rd Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. For convenience, petitioner will refer to the current version of the statute, 49 U.S.C. § 20302(a).

STATEMENT OF THE CASE

1. Respondent William J. Hiles, an employee of petitioner Norfolk & Western Railway Company, was a member of a switching crew at petitioner's Luther Yard in St. Louis, Missouri. His duties at that time included coupling and uncoupling railroad cars.

Railroad cars are joined by couplers located at both ends of all cars. A car's coupling mechanism consists of a knuckle, or a clamp which opens and closes, connected to a heavy drawbar that is fastened to a housing mechanism on the car. To connect two cars, the open knuckle of one car engages the knuckle on another car, and the two cars couple automatically when they come together. Once they are coupled, a worker then secures the knuckle by moving a lever on the side of the car; he can also open a knuckle to uncouple the cars by using that lever.

In order for coupling to take place, the drawbars of the cars must be aligned to connect on impact. If they are not aligned, the knuckles will not contact each other, and the cars will not couple. The drawbar has some horizontal play in order that coupled railroad cars can make turns without derailing, and because of this movement, drawbars may become misaligned, or "slued." When such misalignment occurs, drawbars must be realigned manually. Manual alignment of a drawbar requires the employee to go between the cars; there is no automatic alignment device in common use. See *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128, 130 (3d Cir. 1991).

On July 18, 1990, respondent was working as a brakeman at petitioner's railyard along with Larry Fauver, a conductor. At approximately 4:00 a.m., respondent was walking along the tracks, examining drawbars to

determine if they were properly aligned, when he noticed a car with a misaligned drawbar. That car was at that time coupled to another car, and Fauver uncoupled the cars. Then both respondent and Fauver went between the two train cars to straighten the misaligned drawbar. Respondent was pulling the drawbar towards him while Fauver was pushing it in an attempt to straighten the bar. Respondent injured his back during this process.

2. Respondent filed suit on December 26, 1991, in the Circuit Court of Madison County, Illinois, alleging only that petitioner violated Section 2 of the federal Safety Appliance Act. See 49 U.S.C. § 20302(a)(1)(A). The SAA makes it unlawful for a railroad to use any car not "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A).[2] Respondent expressly premised his cause of action exclusively on the SAA and included no allegations of negligence that would have triggered independent liability under FELA. Petitioner filed an amended answer, raising the affirmative defense that any improper alignment of the drawbar did not result from defective equipment.

During trial, petitioner filed a Motion for Summary Judgment on liability, arguing that respondent had produced no evidence of a defect in the drawbar alleged to have caused respondent's injury. The court denied this motion. The court also denied petitioner's Motion for Directed Verdict filed at the close of respondent's case and at the close of all evidence. Instead, the court granted respondent's Motion for a Directed Verdict on the issue of petitioner's liability.

Petitioner made an offer of proof of evidence that the misalignment of the drawbar was not caused by a defect

[2] The Federal Employer's Liability Act ("FELA") renders railroads liable for violation of the SAA. 45 U.S.C. § 51.

in the equipment. This offer of proof consisted of the uncontradicted testimony of Walter Miller, general foreman, and Larry Fauver, conductor, and respondent's discovery deposition and certified questions and answers. Miller testified that he inspected the drawbar at 5:40 a.m., approximately one hour and forty minutes after the injury, and found that neither the coupler nor the drawbar were defective. Conductor Fauver testified that at the time he uncoupled the rail cars, the drawbar was improperly aligned. Respondent testified that he was unaware of any defect of the drawbar. The court excluded this evidence as irrelevant to the liability issue under the SAA.

After the court decided liability adversely to petitioner, a trial was conducted on damages. The jury awarded respondent $492,500.00. Judgment was entered against the railroad on May 24, 1993.

3. The Fifth Judicial District of the Appellate Court of Illinois affirmed the Circuit Court on December 29, 1994. The court explicitly recognized its duty to apply federal case law when interpreting the SAA. App. at 4a. Nevertheless, acknowledging expressly the hopeless conflict among the federal circuits, the court followed those federal court cases comporting with Illinois case law interpreting the SAA, see *Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App.), *cert. denied*, 459 U.S. 910 (1982), and affirmed the trial court's judgment. See *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974). The court declined to revisit Illinois precedent, and held that a railroad is liable as a matter of law when an employee can show that two railroad cars failed to couple automatically, and that an employee went between those cars and was injured while attempting to align a misaligned drawbar. App. at 6a; see *Buskirk*, 431 N.E.2d at 412. The employee, held the court, is entitled to a directed verdict of liability

regardless of whether the coupling equipment was defective. App. at 7a. The Illinois Supreme Court denied review. App. at 8a.

REASONS FOR GRANTING THE PETITION

This case is the most recent of numerous state and federal decisions which are sharply divided in their interpretations of the SAA requirement that railroad cars be equipped with "couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A). The decision below presents the Court with several compelling reasons for granting certiorari.

First, in direct conflict with the Illinois state court decision here, the Seventh Circuit has held that mere misalignment of drawbars requiring employees to go between cars to manually align them before the cars can automatically couple does *not* trigger strict liability under the SAA. *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995). Accordingly, in federal court the plaintiff's failure to prove a defect is fatal to a claim under the SAA. *Id.* at 831. This direct conflict creates an intolerable situation: the very same suit will succeed as a matter of law in Illinois state courts and fail as a matter of law if filed across the street in a federal court located in Illinois.

Second, the conflict in the proper interpretation of the SAA extends well beyond Illinois. Many other courts, both state and federal, are hopelessly split on the issue of whether a railroad employee going between two railroad cars to straighten a misaligned drawbar and injuring himself constitutes a per se violation of the SAA. The Eighth and Tenth Circuits, along with a significant trend of state courts, hold that misalignment of a drawbar violates the Act. *Coleman*, 681 F.2d 542; *Metcalfe*, 491 F.2d 892; see also, *e.g.*, *Finley* v. *Southern Pac. Co.*,

179 Cal. App. 2d 424 (1960); *Schaaf* v. *Chesapeake & Ohio Ry.*, 317 N.W.2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983); *Plouffe* v. *Burlington N., Inc.*, 730 P.2d 1148 (Mont. 1986). In contrast, the Third, Fourth, Fifth, Sixth, and Seventh Circuits hold that if a misaligned drawbar is nondefective, there is no SAA violation. *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128 (3d Cir. 1991); *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek*, 30 F.3d 823.

Third, the decision below, holding that misaligned drawbars are a per se violation of the SAA, incorrectly interprets the statute's requirements, and is unfaithful to this Court's interpretation of the SAA. The Appellate Court's opinion here gives 49 U.S.C. § 20302(a)(1)(A) an unduly sweeping application and improperly applies this Court's decision in *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96 (1950). Accordingly, the decision below should be reviewed and reversed.

Finally, it is important that the Court resolve this recurring and often dispositive issue involving a fundamental statute regulating relations between railroads and their employees. This Court "is the only body capable of resolving conflicts between the various lower courts, both federal and state." *Novack Inv. Co.* v. *Setser*, 454 U.S. 1064, 1064-65 (1981) (White, J., dissenting from the denial of certiorari).

1. Review by this Court is crucial to assure uniformity in the interpretation of federal law. Indeed, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). Where a state court and a fed-

eral court of appeals covering that same state adopt inconsistent rules of law, review is particularly appropriate to eliminate forum shopping and to avoid the inequitable administration of the laws inherent in having conflicting rules governing the same jurisdiction. *Cf. Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (describing the twin goals of the *Erie* doctrine). For this reason, the Court has not hesitated to grant certiorari to resolve such conflicts. See *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523 (1994); *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1944 (1994); *Hagen* v. *Utah*, 114 S. Ct. 958, 964 (1994); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *DeCoteau* v. *District County Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 430-31 (1975); *Thomas* v. *Hempt Bros.*, 345 U.S. 19, 20 (1953).

The instant case would clearly have been decided differently in a federal court located in Illinois than it was in the Illinois state court. If Hiles had filed suit under Section 2 of the SAA in the Southern District of Illinois in East St. Louis, in order to recover he would have been required to prove that there was a defect in the misaligned drawbar, which he made no attempt to do. See *Lisek*, 30 F.3d at 831. However, because Hiles filed suit in state court in Edwardsville, Illinois, just eleven miles from East St. Louis, the mere existence of a misaligned drawbar, defective or not, was declared a per se violation of the SAA. App. at 7a. The outcome of the instant case is particularly intolerable because petitioner in this case, Norfolk & Western Railway, has been forced to defend itself in different courts in Illinois following two opposing interpretations of the same statute. Compare *Lisek*, 30 F.3d 823 with *Hiles* v. *Norfolk & W. Ry.*, App. at 1a-7a.

Lisek and *Hiles* are indistinguishable on their facts. Lisek, a switchman, was checking railroad cars in preparation for coupling them and noticed a misaligned drawbar, as did respondent. Lisek went between the rails to realign the drawbar, and was injured pushing it, as was respondent. *Lisek*, 30 F.3d at 825.

The opinion of the court below acknowledged the conflict with the Seventh Circuit as well as the widespread split on this issue in other courts, and expressly invited review of the question by this Court: "[U]ntil the United States Supreme Court resolves the issue, we will adhere to *Buskirk* and the line of Federal cases upon which it is predicated." App. at 6a. The Court should accept the invitation and grant certiorari to resolve this manifest conflict.

2. There is a significant split among federal circuits on the precise issue raised in this case, and the majority of federal circuits are also split with state courts on the same issue. The decision below conflicts with the overwhelming trend of current federal case law interpreting this provision of the SAA.

Since 1986, every federal court deciding this issue—the Third, Fourth, Fifth, Sixth, and Seventh Circuits—has held that a railroad has not violated the SAA where its coupling equipment was nondefective and operating properly. Under these cases, the existence of a misaligned drawbar does not in itself violate the SAA; the railroad may, as a defense, show that the misaligned drawbar was not defective. *Kavorkian* v. *CSX Transp. Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek*, 30 F.3d 823; *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983) (holding that Section 2 of the SAA does not prohibit a certain procedure that requires employees to go between cars because Section 2 is only violated if nondefective equipment does not perform as prescribed).

Another earlier pair of federal cases held that the railroad employee proves a violation of the SAA by showing he went between two cars to align an improperly aligned drawbar. *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974). State courts have also generally held that a failure to couple because of simple drawbar misalignment constitutes a per se violation of the Act. See *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York, and Utah). The state court and minority federal court line of cases plainly conflicts with the more recent line of federal court of appeals decisions.

The recent trend of federal decisions holds that injury due to misalignment of drawbars does not constitute a per se violation of the SAA, and a railroad is permitted to prove in its defense that the misalignment was not caused by defective equipment. In cases in this line where there was a failed attempt at coupling, the courts have held that a failure to couple caused by a nondefective misaligned drawbar does not trigger absolute liability under the SAA. *Kavorkian*, 33 F.3d 570; *Reed*, 939 F.2d 128; *Maldonado*, 798 F.2d 764; *Towles* v. *Burlington N.R.R.*, No. CS-93-270-JBH, 1994 WL 151073 (E.D. Wash. Apr. 20, 1994).

In *Kavorkian*, the Sixth Circuit held that a railroad will not be liable under the SAA for injuries proceeding from failed coupling due to misaligned drawbars. *Kavorkian*, 33 F.3d at 576. Any danger workers face in realigning a nondefective drawbar is beyond the scope of the statute. *Id.* at 575. Similarly, the Third Circuit in *Reed* held that where misaligned drawbars fail to couple, a railroad will not be liable if it can show that the equipment was not defective. *Reed*, 939 F.2d at 128, 132. A mere failure to couple does not violate the SAA. *Id.* at 132. The Appellate Court in this case expressly

acknowledged that its holding conflicted with these decisions.

The two cases where there was no pre-injury attempt to couple the cars also held that misalignment of nondefective drawbars does not violate the SAA. The Seventh Circuit's recent opinion in *Lisek* held that "the mere existence of a misaligned drawbar cannot trigger the railroad's absolute liability." *Lisek*, 30 F.3d at 831. Similarly, the Fourth Circuit in *Goedel* held that a failure of nondefective drawbars to couple automatically does not violate the SAA; a misaligned coupler alone does not violate the Act. *Goedel*, 13 F.3d at 812.

In sum, there exists a concrete conflict between state courts and a majority of the federal circuits as well as an acknowledged federal circuit split concerning the correct interpretation of Section 2 of the SAA, *viz.*, whether there is a violation of the SAA when an employee goes between two cars to align a drawbar where the equipment is nondefective. This Court should grant the petition and establish a uniform interpretation of this provision to create much-needed consistency among lower state and federal courts.

3. The Illinois Appellate Court misinterpreted 49 U.S.C. § 20302(a), as well as this Court's precedent, in holding that a railroad could not present a defense that a misaligned drawbar was nondefective where an employee was injured between two cars realigning the drawbar. That error reinforces the propriety of this Court's review.

The SAA is an equipment safety statute. *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764, 768 (5th Cir. 1986); *United Transp. Union* v. *Lewis*, 711 F.2d 233, 243-44 (D.C. Cir. 1983); *Towles* v. *Burlington N.R.R.*, No. CS-93-270-JBH, 1994 WL 151073, at *8 (E.D. Wash. Apr. 20, 1994). Section 2 only serves to require certain mandatory equipment and does not prescribe operating procedures: the plain language of the statute

simply requires that cars must be equipped with automatic couplers of the type that will couple without railroad workers having to go between the ends of the cars. 49 U.S.C. § 20302(a). The statute "does not separately prohibit the act of going between cars" to deal with an operational problem with equipment that otherwise complies with the statute. *United Transp. Union*, 711 F.2d at 251. Respondent does not dispute that such couplers, in fact, were in place on both cars at issue in this case. A railroad, then, cannot be strictly liable under the SAA when its cars are furnished with nondefective equipment. *Towles*, 1994 WL 151073, at *8.

It is inevitable that nondefective railroad car couplers will, on occasion, be misaligned. *Goedel*, 13 F.3d at 812. This Court has recognized that "[s]ome lateral play must be allowed to drawheads . . . ." *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916). To ensure that railroad cars do not derail on curves, it is a practical necessity that the cars' drawbars have some lateral play. *Goedel*, 13 F.3d at 812. Additionally, "a drawbar frequently becomes misaligned by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different track, to such a degree that coupling can not occur without realignment." *Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *United Transp. Union*, 711 F.2d at 235 & n.5. No nonmanual method currently exists for aligning misaligned drawbars. In drafting the SAA, Congress could not have intended to mandate the use of equipment unavailable at that time, let alone so uncommon a century later. *Lisek*, 30 F.3d at 831. To the extent that the railroad is negligent in failing to correct an equipment malfunction, it may be liable under the FELA, 45 U.S.C. § 51, a claim respondent did not raise in his complaint. But the railroad is not strictly liable under the SAA if the proper equipment is in place.

Interpreting the statute as the lower court has here imposes the impossible standard that a railroad is liable

for any injury incurred when an employee straightens a drawbar misaligned in the ordinary use of the car. "[T]he Safety Appliance Act was created to reduce the risks associated with coupling rail cars and not to require that drawbars be aligned perfectly at all times." *Goedel*, 13 F.3d at 812. The SAA cannot place absolute liability on a railroad merely because a drawbar is slued, or misaligned, particularly because there is no device currently in use that will automatically straighten misaligned drawbars. The Seventh Circuit declared that "[i]f it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railyard operations, then it is simply not reasonable to hold that such misalignment amounts to a violation of the Act." *Lisek*, 30 F.3d at 830-31. Such a result would be worse than unreasonable; the Seventh Circuit explicitly refused to "accept[] a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2—and have done so for the entire 90 years the Act has been in effect." *Id.* at 831 (quoting *United Transp. Union*, 711 F.2d at 251 n.39).

This understanding of the Act was adopted by the Court in *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96 (1950). There, the Court held that a plaintiff under Section 2 of the SAA did not have to show a defect if the coupler did not perform properly. *Id.* at 99. The Court also held, however, that the railroad had a good defense to absolute liability under the SAA if both knuckles, or clamps at the ends of drawbars, were closed at the time of impact and the cars failed to couple. In order for the railroad to be liable for injuries caused by the failure to couple, the coupler must have been set properly. Justice Jackson, dissenting on the issue of the jury instruction below but agreeing with the majority on the law, stated: "Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not

that of the device." *Id.* at 101 (Jackson, J., dissenting); see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949) ("[T]he absence of a 'defect' cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question.").

While *Affolder* held that closed knuckles meant a coupler was not properly set and the railroad was therefore not liable, the Court did not reach the question of whether drawbar misalignment, another common cause of failed coupling, constituted a per se violation of the SAA. The *Affolder* exception to absolute liability under the SAA, requiring that couplers be "properly set," applies equally to misaligned drawbars as well as to unopened knuckles. As the Third Circuit stated in *Reed*, "[i]n both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar." *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128, 132 (3d Cir. 1991); see *Kavorkian*, 33 F.3d at 575.

Because the *Affolder* defense of defective equipment logically extends to misaligned drawbars, the Illinois Appellate Court was wrong in holding petitioner per se liable. The lower court's opinion should be reversed and therefore certiorari should be granted.

4. Federal and state courts have demonstrated a pressing need for guidance on this fundamental, disputed question affecting liability on a daily basis for all railroads. This is no obscure legal issue of merely academic interest. The very same question has arisen repeatedly across the nation in railroad litigation, including twice at the federal court of appeals level quite recently. See *Kavorkian*, 33 F.3d 570; *Goedel*, 13 F.3d 807. The issue will unquestionably recur; railway employees surely will continue to sue railroads under the SAA for injuries incurred while manually aligning drawbars.

Additionally, the issue is a significant one because it is dispositive of the case when, as here, it is misapplied. If a court follows the holding of the opinion below and the Eighth and Tenth Circuits, a railroad employee will succeed *as a matter of law* when he goes between two railroad cars to straighten a misaligned drawbar and is injured, regardless of any evidence of defective equipment. If a court follows the more recent and unbroken line of federal court of appeals cases, however, the railroad will prevail *as a matter of law* if the employee shows no evidence that the equipment was defective. For the outcome of cases under this statutory provision to depend so completely on fortuity of the forum in which the suit is brought is absolutely untenable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1995

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APPENDICES

APPENDIX A

[Filed Dec. 29, 1994]

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-93-0775

WILLIAM J. HILES,
Plaintiff-Appellee,
v.

NORFOLK AND WESTERN RAILWAY COMPANY,
a Corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County.
No. 91-L-1605
Honorable Phillip J. Kardis, Judge, presiding

JUSTICE WELCH delivered the opinion of the court:

On December 26, 1991, William J. Hiles (plaintiff), filed a one-count complaint against the Norfolk & Western Railway Company (defendant) in the circuit court of Madison County. Plaintiff brought his action under the Federal Safety Appliance Act (Safety Appliance Act) (45 U.S.C.S. sec. 1 *et seq.* (Law. Co-op 1981 & Supp. 1994)). In relevant part, it was alleged:

> "3. That on July 18, 1990, the plaintiff * * * was working as a member of a switching crew located at Defendant's St. Louis Yard, at or near St. Louis,

> Missouri. At that time, in the course and scope of his duties, he was required to go between two railroad cars to straighten a misaligned draw bar and was injured attempting to "straighten" said drawbar, all in violation in whole or in part of the aforesaid Safety Appliance Act."

On May 20, 1993, defendant filed an amended answer raising, *inter alia*, the affirmative defense that "plaintiff's claim that the drawbar or coupler was not aligned was a result of simple misalignment and not the result of defective equipment." Also on May 20, 1993, defendant filed a motion for summary judgment and a supporting memorandum of law. In pertinent part, defendant's memorandum states:

> "Plaintiff has filed a cause of action for injuries allegedly resulting from realigning a drawbar between rail cars. Plaintiff * * * has not presented any evidence of a defective drawbar or coupler system. Plaintiff claims per se liability under the Federal Safety Appliance Act based on a slewed drawbar.
>
> [Defendant] has clearly established, through the Affidavit of General Foreman Walter A. Miller, Jr., the drawbar and coupler involved in the subject occurrence were not defective at the time of plaintiff's alleged injury. This evidence is uncontested.
>
> If [defendant] can prove the slewed drawbar was cause [*sic*] by something other than defective equipment, it will avoid liability under the Safety Appliance Act."

The trial court denied defendant's motion for summary judgment. Relying on *Buskirk v. Burlington Northern, Inc.* (1982), 103 Ill. App.3d 414, 431 N.E.2d 410 (railroad held liable as a matter of law under the Safety Appliance Act where employee went between railcars and injured his back while struggling to realign

a drawbar that had failed to automatically couple), plaintiff filed a motion for directed verdict on May 20, 1993. According to plaintiff, the evidence was uncontradicted that "he went between two cars which failed to couple automatically and * * * while aligning a misaligned drawbar, he was injured." As a result, plaintiff concluded that he was entitled to a directed verdict based upon this court's *Buskirk* decision.

The trial court agreed and granted plaintiff's motion for a directed verdict on the issue of liability. Defendant made an offer of proof that consisted of the testimony of two employees. Walter Miller, a general foreman, stated that his inspection did not reveal any kind of mechanical defect in the drawbar on the car involved in plaintiff's injury. Larry Fauver, a switchman who was working with plaintiff at the time of the injury, stated that the drawbar was slued. Defendant also submitted plaintiff's discovery deposition and certified questions and answers in support of the offer of proof.

On May 21, 1993, defendant filed a motion for a directed verdict at the conclusion of all the evidence. The trial court denied the motion, and the jury returned a verdict in favor of plaintiff. Defendant's posttrial motion was denied on October 21, 1993.

On appeal, defendant argues that the trial court erred: (1) by allowing plaintiff to present evidence of a *per se* violation of the Safety Appliance Act without requiring a showing of a defect in the drawbar or coupler and further erred by directing a verdict in favor of the plaintiff on the issue of liability; and (2) when it improperly excluded evidence that the misaligned drawbar was not caused by defective equipment or that it was caused by something other than defective equipment and further erred by denying the defendant's motions for directed verdict on the issue of its liability under the Safety Appliance Act. We disagree.

The operative section of the Safety Appliance Act upon which this case was tried makes it "unlawful for any such railroad [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.S. sec. 2 (Law. Co-op Supp. 1994).) The purpose of section two is "to obviate the risks to employees by reason of their going between railroad cars to manually couple and uncouple them." *Leveck v. Consolidated Rail Corp.* (1986), 148 Ill. App.3d 118, 123, 498 N.E.2d 529, 532.

To get an idea of how the mechanics of "coupling" operate, we quote the following explanation:

> "Each rail car has a coupling mechanism located on each end which allows cars to be connected with other cars. The standard coupling mechanism consists of a knuckle attached to a drawbar. The drawbar is in turn attached to the rail car. The knuckle is a clamp which can be opened and closed as required and is designed to couple automatically with another knuckle on impact when the couplers are properly aligned. The drawbar has several inches of lateral play so that the rail cars can negotiate turns without derailing. However, because of the lateral play, the knuckles occasionally become misaligned and may fail to couple automatically upon impact. No device has been developed for widespread use that would automatically align the drawbars." *Goedel v. Norfolk & Western Ry. Co.* (4th Cir. 1994), 13 F.3d 807, 809.

It is well established that in construing the Federal Employer's Liability Act and the Safety Appliance Act, as with other Federal statutes, this court must look to Federal decisions for guidance and interpretation. (See, *e.g., Bailey v. Central Vermont Ry., Inc.* (1943), 319

U.S. 350, 352, 87 L.Ed. 1444, ——, 63 S. Ct. 1062, 1063; *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.* (1967), 38 Ill.2d 31, 34, 230 N.E.2d 173, 176; *Templeton v. Chicago & Northwestern Transportation Co.* (1991), 211 Ill. App.3d 489, 495, 570 N.E.2d 467, 471, *rev'd on other grounds* (1992), 151 Ill.2d 325, 603 N.E.2d 441.) Two purposes are served by a rule requiring application of Federal decisional law: (1) preventing the erosion of rights conferred by Federal law and (2) achieving uniformity. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 226, 142 N.E.2d 104, 127.

At the outset, we note that there is no uniformity in the case law on the issue of whether a misaligned drawbar, absent evidence of defective coupling equipment, constitutes a violation of the Safety Appliance Act. "The malfunctioning and misalignment of rail car couplers has received varied treatment from the federal courts over the years." (*Goedel*, 13 F.3d at 810.) There are two lines of cases addressing this issue.

Under one line of cases, there is no violation of the Safety Appliance Act if the coupling equipment is nondefective. Thus, the existence of a misaligned drawbar, in the absence of proof of defective coupling equipment, is not a violation of the Safety Appliance Act. *Kavorkian v. CSX Transportation, Inc.* (6th Cir. 1994), 33 F.3d 570, ——; *Lisek v. Norfolk & Western Ry. Co.* (7th Cir. 1994), 30 F.3d 823; *Goedel*, 13 F.3d at 811-12; *Reed v. Philadelphia, Bethlehem & New England R.R. Co.* (3d Cir. 1991), 939 F.2d 128, 132; *Maldonado v. Missouri Pacific Ry. Co.* (5th Cir. 1986), 798 F.2d 764, 768.

Under the second line of cases, to which two Federal circuits currently adhere, a railroad is liable for injuries under the Safety Appliance Act when cars fail to automatically couple due to a misaligned drawbar. (*Coleman v. Burlington Northern, Inc.* (8th Cir. 1982), 681 F.2d 542, 544-45; *Metcalfe v. Atchison, Topeka & Santa Fe*

Ry. Co. (10th Cir. 1974), 491 F.2d 892, 896-97; *Kansas City Southern Ry. Co. v. Cagle* (10th Cir. 1955), 229 F.2d 12, 14-15.) As the Seventh Circuit recently observed in *Lisek*, "The state courts have * * * overwhelmingly held that a failure to couple due to drawbar misalignment constitutes a violation of the [Safety Appliance Act]." *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York, and Utah).

This court has repeatedly held that a railroad is liable as a matter of law under the Safety Appliance Act when an employee goes between railcars and is injured while attempting to force back into position a drawbar that has failed to automatically couple, regardless of whether the coupling equipment is defective. *Pry v. Alton & Southern Ry. Co.* (1992), 233 Ill. App.3d 197, 214, 598 N.E.2d 484, 496; *Leveck*, 148 Ill. App.3d at 123, 498 N.E.2d at 532; *Reynolds v. Alton & Southern Ry. Co.* (1983), 115 Ill. App.3d 88, 95, 450 N.E.2d 402, 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.

The principal question in this case is whether this court should, as defendant suggests, abandon our long-standing authority permitting a plaintiff such as Hiles to recover under the Safety Appliance Act for injuries sustained while attempting to align a misaligned drawbar. Having carefully considered all the applicable cases and the arguments advanced by the parties, we decline defendant's invitation to overrule *Buskirk*.

There is currently no uniformity among the Federal circuits on the question raised in this case. We are not required, as defendant intimates throughout its brief, to follow the rule enunciated by the Third, Fourth, Fifth, Sixth, and Seventh Circuits. Until such time as the Eighth and Tenth Circuits overrule *Coleman* and *Metcalfe*, or until the United States Supreme Court resolves the issue, we will adhere to *Buskirk* and the line of Federal cases upon which it is predicated.

Because we have resolved the first issue in plaintiff's favor, the outcome of the second issue is preordained. Plaintiff was entitled to a directed verdict on the issue of liability. (See *Reynolds*, 115 Ill. App.3d at 95, 450 N.E.2d at 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) All a plaintiff such as Hiles is required to show in order to obtain a directed verdict on the issue of liability is that: (1) railroad cars failed to couple automatically and (2) he went between the cars and was injured while trying to straighten a misaligned drawbar. (*Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) Plaintiff met these requirements in the instant case and was thus entitled to a directed verdict. Based upon our review of the record, the trial court did not err in granting a directed verdict on the issue of liability. See *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (directed verdict is proper only when all of the evidence, viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand).

For the aforementioned reasons, we hereby affirm the judgment entered by the circuit court of Madison County.

Affirmed.

GOLDENHERSH and LEWIS, JJ., concur.

APPENDIX B

78564

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 5, 1995

Mr. Kurt E. Reitz
Thompson & Mitchell
525 West Main Street, P.O. Box 750
Belleville, IL 62222-0750

No. 78564—William J. Hiles, respondent, v. Norfolk and Western Railway Company, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 1995.

APPENDIX C

[Filed May 24, 1993]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

91-L-1605

WILLIAM J. HILES,
Plaintiff,

-vs-

NORFOLK & WESTERN RAILWAY CO.,
a Corporation,
Defendant.

JUDGMENT

This cause called for jury trial May 17, 1993, all parties present with respective counsel, a jury was duly selected and sworn. Sworn testimony and evidence was submitted on behalf of all parties.

The jury returned its verdict, to-wit:

> "We, the jury, find for the plaintiff, William Hiles, on his complaint and against the Defendant, Norfolk & Western Railway Company. We assess the plaintiff's damages in the sum of $492,500.00, itemized as follows:
>
> Disability $100,000.00
> Past & Future Pain and Suffering $57,500.00
> Past Lost Wages $100,000.00
> Future Lost Wages $235,000.00
> TOTAL: $492,500.00"

Judgment on the verdict is hereby entered as follows:

Judgment entered in favor of the plaintiff William Hiles, against the defendant Norfolk & Western Railway Company for $492,500.00 plus the costs of this action.

The clerk is directed to mail copies of this Judgment to all counsel of record.

Dated this 24th day of
May, 1993.

/s/ Phillip J. Kardis
PHILLIP J. KARDIS
Circuit Judge